SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 280, 314 and 966

ROSCO JONES,

Petitioner,

vs.

CITY OF OPELIKA;

LOIS BOWDEN AND ZADA SANDERS,

Petitioners,

vs.

CITY OF FORT SMITH, ARKANSAS;

CHARLES JOBIN,

Appellant,

vs.

STATE OF ARIZONA.

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Amicus Curiae,
By ELISHA HANSON,
Counsel for Amicus Curiae.

INDEX.

Subject Index.

Citations.

Cases:

Constitutional Provisions:

Miscellaneous:

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in the above entitled causes in support of petitioners [1] herein.

[1] For convenience petitioners and appellant are collectively referred to as petitioners.

Statement of the Case.

In the interest of brevity the Amicus Curiae accepts the statements of the cases as set forth in the briefs of petitioners before this Court by writs of certiorari in Nos. 280 and 314 and by appeal in No. 966. It also relies upon the statements of fact in the opinions of this Court rendered in these cases on the first argument. 316 U. S. 584 (1942).

Interest of the Amicus Curiae.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

Among the functions of the daily newspaper press is the gathering and dissemination of information in the form of news, editorial comment and advertising.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

Advertising is information concerning the goods, services or ideas of one who is willing to pay to have that information disseminated through the press.

The Amicus Curiae files this brief because it believes that the license taxes in the cases herein establish a dangerous precedent for licensing the press by legislative devices which resurrect the evils the First Amendment was intended forever to remove.

The Amicus Curiae submits that the judgments of conviction below violate the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved.

The First Amendment to the Constitution of the United States is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT.

The First and Fourteenth Amendments deny to the legislature the power to license or to tax the publication or circulation of information or ideas through the press or other media.

The issue in the cases before this Court is whether under our Constitution the legislature has the power to require a license as a condition precedent to the exercise of the rights guaranteed by the First Amendment and protected by the Fourteenth Amendment against invasion by the states. See *Near* v. *Minnesota*, 283 U. S. 697 (1931).

No such power exists. If it does exist, then the historic struggle which culminated in the adoption of the First Amendment—indeed, in the entire Bill of Rights—was all in vain.

All three ordinances in controversy not only make the taking out of a license mandatory but also require the payment of a license fee or privilege tax. Whether this dual requirement is considered separately or together, it still remains true that a municipality is forbidden by the Constitution to compel a license or a payment of a tax or both as a condition precedent to the dissemination of information and opinion in any form.

If the flat license taxes in these cases are sustained, then a way has been found effectively to curtail or even to prohibit the spreading of views on matters of public importance.

Historical Background of Controversy.

Nothing has been made plainer in prior decisions of this Court than that the First Amendment resulted from a long history of resistance of the press to the twin evils of censorship through licensing of the press and the notorious "taxes on knowledge" in the form of stamp taxes on the circulation and taxes on advertising matter of newspapers, periodicals and pamphlets.

This Court has recorded that history in numerous decisions, notably in *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), and *Bridges* v. *California, Times-Mirror Co.* v. *Superior Court*, 314 U. S. 252 (1941).

In the *Grosjean* case it was recounted how licensing was used at first in England and then in the American colonies to control the press by a system of censorship. In the wake of the last English licensing Act in 1694 came the "taxes on knowledge". These found their counterpart in America in

the Stamp Acts. The storm of protest of the colonists against these devices of suppression was directly responsible for the insistence upon specific guaranties of freedom of religion, of speech and of the press in the First Amendment. As Mr. Chief Justice Hughes declared in *Lovell v. Griffin*, 303 U. S. 444, at page 451 (1938):

> "The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing'. And the liberty of the press became initially a right to publish *'without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision."

History further discloses that the Constitution orginally did not contain a Bill of Rights and that there was a controversy between the Federalists, who advocated ratification of the Constitution as it then stood, and the Republicans, who demanded a Bill of Rights as a condition to the ratification of the Constitution. One fact that stands out above all others is that both sides in the controversy were convinced that freedom of the press should not be infringed through governmental regulation of any sort, kind or description. The controversy was over the method of protecting the principle and not over the principle itself. See Ford, Pamphlets on the Constitution of the United States, 1787-1788, pp. 113, 156-157, 316 (1888); Pennsylvania and the Federal Constitution (McMaster and Stone, Eds.), pp. 180, 181, 576 ff. (1888); Stevens, Sources of the Constitution of the United States, pp. 213, 218, 221 (1894).

From that historical background has emerged the fundamental interpretation that the First Amendment is a grant

of immunity from every conceivable form of abridgment of a free press, whether it be a previous restraint upon publication or a restraint upon circulation subsequent to publication. *Near* v. *Minnesota, supra; Lovell* v. *Griffin, supra; Schneider* v. *State*, 308 U. S. 147 (1939). And to remove any doubt concerning the extent of this protection this Court recently declared that

> "the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." (*Bridges* v. *California, Times-Mirror Co.* v. *Superior Court, supra*, at page 265.)

Tested by the foregoing genesis and interpretation of the First Amendment, which the Fourteenth Amendment makes applicable to the states, each of the ordinances in the present cases is *on its face* an unconstitutional restraint upon the freedom of the press. As Mr. Chief Justice Stone has declared:

> "For on its face a flat license tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." (316 U. S. at page 609.)

When a tax must be paid to secure a license for doing certain acts the acts done are illegal unless the license is obtained. That can only mean that a license tax creates a condition precedent to the right to engage in a given activity. Precisely that situation is presented in the cases before this Court. The license taxes herein by their very nature constitute conditions precedent to the exercise of the right to distribute printed information.

Power to License Prohibited.

No agency of government can impose such conditions upon the press. The First and Fourteenth Amendments deny power to compel a publisher to choose between taking a license or refraining from the activity of publication and dissemination. The requirement of a license is in itself an impediment upon the press. It subjects to regulatory control the essential functions of publication and circulation. If such regulation is valid all the functions of the press can be thus regulated. The imposition of restraints of that character upon the press revive the evils at which the First Amendment was directed.

Whether the tax be called a license tax, a privilege tax, an occupation tax, a business tax or a fee; any tax or other exaction which falls directly upon the act of circulation is an invasion of the liberty of the press. It is the old stamp tax in another and more evil guise.

The question involved in these cases is the *existence* of the power to burden the press by laying license taxes upon the distribution of printed information—not the reasonable exercise of the power to tax. It is respectfully submitted that there is no such power.

No tenable distinction can be rested upon the mode of issuance of the license or the terms upon which a license may be denied or revoked. It is immaterial whether the license issues as a matter of course or whether its issuance is governed by specific standards or is at the uncontrollable discretion of an administrative official.

The same considerations apply to revocation of the license since revocation under any circumstances creates a condition subsequent to the continuance of dissemination of printed information. This is just as effective a clog upon the press as a condition precedent which sets up a barrier

to entry into the publishing field. None of the foregoing distinctions can change the character of the license taxes herein as unconstitutional restrictions upon the functions of the press.

Since each of the ordinances in question is void on its face the issue of constitutionality is presented irrespective of whether a person within the terms of the ordinances applies for a license. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Lovell* v. *Griffin*, *supra*. Concerning an ordinance invalid on its face Mr. Chief Justice Stone has observed:

> "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands". (316 U. S. at page 602.)

Prior decisions irrefutably establish that this Court will test the statute on its face and weigh the likelihood of unconstitutional application or operation beyond the facts of the particular case before it. *Smith* v. *Cahoon*, 283 U. S. 553 (1931). In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), at page 97, the principle was stated as follows:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute *purporting to license the dissemination of ideas*". (Emphasis supplied.)

So here it is appropriate to consider the hazards to which the press may be exposed as a result of the upholding of the license taxes in the instant cases. If the legislature can require a license as a condition precedent to the circulation of press information it can impose an identical license as a condition to engaging in the newspaper publishing business. It can then impose heavy fines and penalties for non-payment of the license fee and enjoin publication or distribution until the fee is paid. If the state has such power it can make

the conditions of the license whatsoever it wills, to the extent, for instance, that only a few newspapers can perform the functions of the press, or even to such an extent that none can perform those functions at all.

The Founding Fathers determined that the public good required that the press shall not be subject to regulation or control by any agency of government. The First Amendment places freedom of the press in a preferred position, as Mr. Chief Justice Stone has pointed out. 316 U. S. at 608. The press is not an ordinary private business that is subject to licensing or control. It is not like a public utility that can be required to take out a license or obtain a certificate of convenience and necessity or procure a charter with special limitations before it can operate. Nor can the immunity of the First Amendment be destroyed by classifying the press in a licensing statute along with businesses whose functions are not like those of the press.

To License is to Destroy One's Freedom.

The very fact of licensing to engage or continue in the business of publishing or circulating newspapers destroys the independence of the press. When regulation enters the door, independence flies out the window. From that moment practically every activity of the press may be regulated.

If the state has the power to license or regulate the press then it can determine who might or might not engage or continue in the newspaper publishing business and limit the extent of their activities therein; where and when a newspaper might circulate; how many copies it might distribute; what it should or should not publish; who might or might not advertise in it; what it should charge for its publications; what it should charge its advertisers for the services rendered therein. Under a power to license or regulate the press the legislature can also claim the power

to classify the press for regulatory purposes on the basis of such factors as the volume of circulation, frequency of issue and area of distribution. If there is power to impose license taxes as a price for carrying on the operations of the press, then there is nothing to prevent the legislature from declaring that the business of publishing newspapers is a business to be licensed. And if it can so declare it can also license the preacher of the gospel and can limit those who can preach to the destruction of freedom of religion as guaranteed by the First Amendment.

All such invasions of the liberty of the press and of religion are plainly prohibited by the unequivocal and broad commands of the First Amendment addressed to the states through the Fourteenth Amendment.

A License Tax is Not an Ordinary Tax.

The issue in these cases becomes confused unless a careful distinction is made between license taxes and ordinary taxes. In this connection it is imperative that misconceptions attributable to a dictum of this Court in *Associated Press* v. *NLRB*, 301 U. S. 103, 132 (1937)[2] be disposed of.

The Amicus Curiæ has previously conceded before this Court,[3] and repeats here, that newspapers are not immune from certain general laws. For example, the press is answerable for abuses to which the general law of libel applies. Similarly, newspapers are not immune from the ordinary

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[2] "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and non-discriminatory taxes on his business."

[3] Brief of the American Newspaper Publishers Association as Amicus Curiæ, *Times-Mirror Co.* v. *Superior Court*, No. 64, United States Supreme Court, October Term, 1940.

forms of taxation. Newspapers pay a large number of different taxes, among which are federal and state income taxes, federal capital stock taxes, federal social security taxes, corporate franchise taxes, real and personal property taxes and unemployment compensation taxes. Such taxes are laid to support the government and, of course, may operate to increase the cost of doing business. Cf. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). They also provide adequate sources of revenue to satisfy the needs of government so that there is no necessity to resort to taxes which seriously hinder the functions of the press. But none of the foregoing taxes, as distinguished from the license taxes in the present cases, has a prohibitory or censorial quality or operates as a condition precedent to the publication or circulation of newspapers.

The Amicus Curiæ subscribes fully to the propositions of Mr. Chief Justice Stone that the commands of the First and Fourteenth Amendments as applied to the press extend at least to every form of taxation which, because it is a condition of the exercise of the right of publication and circulation, is capable of being used to control or suppress such activities. 316 U. S. at page 608. Only by the application of this principle can this Court reconcile the power to levy ordinary taxes for the support of government with the constitutional limitations in the First and Fourteenth Amendments.

License taxes on the operations of the press fall within the proscribed category. Such taxes are not ordinary forms of taxation which merely take money out of the pockets of the publisher, as in the case of taxes heretofore mentioned. License taxes have a prohibitory or censorial quality either on their face or in the potentialities of their administration.

The Power to Tax is the Power to Destroy.

Once it is decided that a license tax can be laid upon the right to publish or to disseminate printed matter then there is no limit to this power short of complete control or suppression of the press. The validity of such a license tax does not depend upon the small amount of the tax. Prior decisions of this Court have repeatedly pointed out that when a subject matter is brought within the taxing power of a state or municipality the legislature may then fix the rate of the tax and thereby control or destroy the activity taxed. *Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934); *Grosjean* v. *American Press Co., supra.* Where the power to regulate exists there may be no limit to its exercise within the discretion of the state. For if the power exists at all the oppressiveness of the burden upon those burdened cannot interdict the regulation. *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550 (1935). Realistically considered, the taxes in these cases were prohibitive in effect. 316 U. S. at pages 604, 614.

Whether for revenue or for regulatory purposes the small price for a license of today may become the entering wedge for the large price of a license tomorrow. The character and effect and not the amount of the tax is the decisive factor. In the light of the long history of misuse of license taxes as weapons of censorship and suppression of ideas, any tax upon publication or circulation of printed information invades the constitutional guaranty. As Mr. Chief Justice Stone observed:

> "In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression". (316 U. S. at page 611.)

It must also not be overlooked that the sanctioning of the license taxes in the instant cases would open the way to multiple burdens by the imposition of similar taxes by

states or municipalities throughout the United States. The cumulative effect of such taxes would be as effective in destroying the free circulation of ideas as direct censorship. This Court has already safeguarded interstate commerce against burdensome multiple state license taxes. See *Gwinn, White & Prince* v. *Henneford*, 305 U. S. 434 (1939). Obviously, civil liberties should be even more zealously protected.

Nor does the characterization of a license tax as a tax for revenue only change or disguise its nature and effect. The English and American colonial taxes on the circulation of printed matter were purportedly designed for revenue; yet they were deemed obnoxious to a free press because they restrained the diffusion of ideas. 316 U. S. at pages 616-617.

None of the ordinances in controversy contain regulatory features related to the safety, morals or good order of the community. Moreover, there was no valid "police" end to which the regulation could be addressed. The literature was not of itself objectionable. Its dissemination was not accompanied by a breach of peace, an obstruction or littering of the streets, or a "clear and present danger" to organized society. See *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). But even professed regulatory purposes will not save a licensing ordinance under which license taxes in reality fall directly on the exercise of the essential functions of the press.

Misconceptions have also arisen concerning the scope of the holding in *Grosjean* v. *American Press Co., supra.* In that case the State of Louisiana placed a tax upon the advertising revenue of newspapers and magazines with a circulation in excess of 20,000 copies a week. This Court was unanimous in holding that such a tax was an unconstitutional restraint upon the press in a double sense. First, its effect was to curtail the amount of revenue realized

from advertising, thereby affecting the service of the press, and, second, its direct tendency was to restrict circulation.

The rationale of the *Grosjean* case was not rested upon the fact that a selected group of newspapers was singled out for attack by the notorious Huey Long administration then in power in the state. The *Grosjean* case condemns every form of restraint upon the circulation of newspapers in recognition of the fact that liberty of circulation is the very life blood of the press and that every newspaper depends upon advertising revenue to meet the major part of its cost of production. Decreased revenue resulting from taxes on newspaper advertising, therefore, seriously impairs the operations of the press.

The fact that the tax in the *Grosjean* case was one with a long history of hostile misuse against the freedom of the press simply made the purpose to suppress circulation very plain. But, as Mr. Chief Justice Stone has pointed out (316 U. S. at page 608), the First Amendment is not confined to safeguarding the freedoms therein against discriminatory action of the state or to cases where the protected privilege is sought out for attack. Any tax which fetters the press is unconstitutional, as Mr. Justice Sutherland's review of the history of the First Amendment in the *Grosjean* case conclusively demonstrates.

Giragi and Arizona Publishing Company Cases Require Reconsideration.

The Amicus Curiae further submits that this Court should reconsider and clarify the effect of its decision in *Giragi* v. *Moore*, 301 U. S. 670 (1937). In that case the State of Arizona levied a tax of one per cent upon the gross receipts of certain specified but not all businesses in the state. The statute covered the publication of newspapers and was interpreted to include the gross income

derived from the sale of advertisements and notices in such newspapers. It required every person engaged in a business subject to such tax to obtain a license or else suffer fines and penalties.

An examination of the record in the *Giragi* case will show that the contention that the tax there involved was in violation of the Fourteenth Amendment was first raised on motion for rehearing before the Supreme Court of Arizona. Until that motion for rehearing, no federal question had been raised. Consequently, when the record came before this Court on appeal, it was deficient in failing adequately to show in what respects the tax constituted an unconstitutional restraint upon the press.

This Court therefore dismissed the appeal in a per curiam decision for want of a substantial federal question. *Giragi* v. *Moore, supra.* But the matter was disposed of on a jurisdictional statement only and the per curiam decision was not accompanied by an opinion explaining the relation of *Grosjean* v. *American Press Co., supra,* and *Associated Press* v. *NLRB, supra,* to the issue involved. The Amicus Curiae therefore believes that the true character and effect of a tax such as that in the *Giragi* case has never been fully considered by this Court. When so considered a license tax of a percentage of the gross receipts of a newspaper will be found to be as destructive of unhindered performance of the functions of the press as are the flat license taxes in the present cases. If the legislature has the power to levy a gross receipts tax upon the press, then it has the power to increase the rate even to the extent of confiscating the entire gross income of the press. A tax upon the press measured by gross receipts may be a potent instrument to compel a publisher, particularly in the case of small newspapers, to suspend publication or else to publish at a loss.

Nor was the true character and effect of the Arizona gross receipts tax fully considered in *Arizona Publishing Co.* v.

O'Neil, 304 U. S. 543 (1938), where this Court on appeal affirmed the judgment of the District Court of the United States for the District of Arizona upholding the same tax statute as in the *Giragi* case. This case was also decided on the jurisdictional statement and in a per curiam decision which needs clarification.

Since the *Giragi* and *Arizona Publishing Company* decisions this Court has made it plain in *Lovell* v. *Griffin*, *supra*, that the First Amendment safeguards liberty of circulation as well as liberty of publication. The Amicus Curiae believes that in the light of the *Lovell* and subsequent cases the statute in the Arizona cases was as clear a violation of the freedom of the press as are the ordinances in the present cases. In such circumstances a gross receipts tax, in common with flat license taxes, has the vice of imposing a burden directly upon the activities of the press.

Detractors of a free press sometimes argue that the publishers of newspapers and magazines are not guaranteed special privileges by the First Amendment. As Mr. Chief Justice Stone has said, the First and Fourteenth Amendments place the freedoms of religion, press and speech "in a preferred position". 316 U. S. at page 608. In the case of the press its functions, as described in the beginning of this brief, fulfill a historic objective of the discovery and diffusion of knowledge. Freedom of the press is the right of the people to have information of vital public importance free from censorship, restraint or control of those in authority. So, when publishers are constantly on guard to challenge any impairment of a free press, they are not seeking special privileges for themselves or for any class of persons. Rather they are discharging their solemn responsibility as trustees of the right of all the people to open channels of inquiry and discussion on matters of public importance.

If immunity from licensing of the press by taxation is labelled "special privilege" then the very immunity granted by the First Amendment is assailed.

Conclusion.

It is respectfully submitted that the judgments of conviction below be reversed.

Respectfully submitted,

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Amicus Curiae,

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